III. In Licensing LPFM Stations, The FCC Should Remedy State-Sponsored Past Discrimination Against Minorities In Noncommercial Broadcasting

In these Comments, we propose that the FCC's first window for LPFM applicants be reseerved for minority broadcast training institutions ("MBTIs"), including historically Black colleges and universities ("HBCUs"), Hispanic serving institutions ("HSIs") Native American Tribal Colleges ("NATCs") and non-college training schools serving African Americans, Hispanics, Asian Americans and Native Americans. See pp. 64-79 infra. Our proposal will guarantee these institutions access to broadcast facilities with which they can train students.

Diversity has been the primary justification for race-conscious initiatives at the FCC. Our proposal will promote diversity, and it can be justified entirely on that basis. However, we advance it primarily for a very different reason: to remedy the present-day consequences of the FCC's own promotion of discrimination through its broadcast licensing policies, especially in educational broadcasting. Although unpleasant to describe, the FCC's role is so well known that in this instance an Adarand study would be unnecessary even if strict scrutiny applied (which it does not; see pp. 67-74 infra). Our proposal could not be more narrowly narrowly tailored to address the harm we document.

We begin by explaining why this remedy is both needed and mandated.

A. FCC action regulating broadcasters justifies remediation of FCC ratification of its licensees' discrimination

Not only can the Commission remedy the consequences of its ratification of its licensees' discrimination, it must do so. Generations of discrimination in broadcasting can be traced to the

Commission's deliberate licensing of segregationists and its failure to ensure that states apportioned their broadcast licenses among White and minority schools. To understand why this constitutional injury both permits and requires remediation, it is first necessary to understand the evolving concept of broadcast public trusteeship -- which Congress expressly tied to the nondiscrimination principle.68/

Public trusteeship is the theoretical construct that provides the constitutional justification for broadcast regulation. As public trustees, broadcasters are given an exclusive opportunity to use and exploit a scarce and valuable public resource.69/ In exchange for this privilege, broadcasters must serve "the public interest, convenience and necessity" in operating their stations and in airing programming.70/ Because the spectrum is a scarce resource, the Commission was permitted to place "restraints on

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68/ See 47 U.S.C. §303(g) (1934) (under which the Commission is expected to provide for the "larger and more effective use of radio in the public interest"); 47 U.S.C. §151 (1934) (providing that the Commission was to ensure the delivery of wire and radio service "to all the people of the United States"); 47 U.S.C. §151 (1996) (eliminating any doubt about who "all the people" are by adding the words "without discrimination on the basis of race, color, national origin, religion or sex" to Section 151.)

69/ See Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) ("Red Lion").

70/ Charles Logan, "Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation," 85 Calif. L. Rev. 1687, 1688 (1997) ("Logan").

licensees in favor of others whose views should be expressed on this unique medium."71/

As early as 1943, the Supreme Court reaffirmed that the Commission's primary role in regulating the broadcast spectrum was to "secure the maximum benefits of radio to all the people of the United States."72/ The Court, however, recognized that the radio spectrum was not expansive enough to accommodate everyone. Accordingly, the Commission was authorized to determine not only what type of speech was allowed on the spectrum, but also to limit who gained access to the spectrum.73/

Thus, when in exercising these powers the Commission discriminated or ratified and facilitated the discrimination of others, it denied minorities the enjoyment of their liberty interest in using the spectrum.

As the only body that controlled access to the spectrum, the FCC's arbitrary actions preventing minorities from enjoying access to the spectrum stigmatized them and created a disability that is difficult to repair. That disability includes the right to speak in

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71/ Red Lion, 395 U.S. at 388, 389. No one doubts that the spectrum is finite, or that that many more entities wish to use it than can be accommodated, and that huge monopoly rents inure to those occupying it. Indeed, by far the greatest portion of the appraised and sale value of most broadcast stations is the intangible value of the broadcast license. While some maintain that cable and other new technologies have undercut the scarcity rationale, these arguments should not detain the Commission in considering whether there is sufficient spectrum to satisfy the need for local information supplied in aural form. LPFM has been proposed expressly because there is no other distribution mechanism capable, even in theory, of serving this need.

72/ NBC v. United States, 319 U.S. 190, 217 (1943).

73/ See, e.g., Red Lion, 395 U.S. at 389-90.

the public forum of broadcasting and the right to "work for a living in the common occupations of the community."[74]

Accordingly, by validating the intentional, de facto and sometimes de jure discrimination of its licensees, the Commission engaged in the constitutionally impermissible deprivation of a liberty interest in violation of the Due Process Clause.[75]

B. State governments and the FCC deliberately withheld from minorities the benefits of noncommercial broadcasting

The FCC routinely assisted in state schemes to discriminate against historically Black, Hispanic and Native American colleges in station employment and in licensing. LPFM provides an opportunity for the FCC to partly remedy this past discrimination by awarding licenses to MBTIs.

For two generations, the FCC did absolutely nothing to counter its licensees' discrimination, even though its character qualifications standards should have prevented the licensing of discriminators. By systematically awarding licenses and license renewals to segregated and discriminating licensees, two generations of minorities were denied access and opportunity to obtain the education, experience, exposure and contacts needed to succeed in the broadcast industry.

74/ Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972). The right to work is "the very essence of personal freedom and opportunity that was the purpose of the 14th Amendment to secure." Id. This personal freedom is also defined as a liberty interest: "the right...to engage in any of the common occupations of life, to acquire useful knowledge. [I]n a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad." Id.

75/ See Matthews v. Eldridge, 424 U.S. 319 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

Minorities in many states were barred by state law or custom from attending universities operating the only FCC-licensed educational TV and radio stations. An agency regulating television network news must have known this, given the networks' superb coverage of the civil rights movement.

Nonetheless, the FCC routinely provided, then routinely renewed broadcast licenses for these segregated institutions, guaranteeing that a generation of trained broadcast employees would be Whites only.[76/] Furthermore, the FCC did not even bother to inquire whether the schools had complied with the 1896 Supreme Court requirement that facilities could be separate but must (supposedly) be equal.[77/]

Nowhere in the FCC Reports or Pike & Fischer is there a reported case in which the FCC inquired of any educational institution why minorities could not attend the school and enjoy the use of the school's FCC-licensed broadcast station. Nor is there

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76/ Examples include KASU-FM, Arkansas State University, licensed in 1957; WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1958. There were many others. A table illustrating the disparity in FCC licensing of noncommercial facilities is provided as an exhibit to these comments. A comparison of 28 HBCUs' stations and those belonging to the 29 predominantly White state colleges in the same states is quite dramatic. The White schools' stations average signon year was 1970; the HBCU's average signon year was 1980. The White schools' stations mean power level was 40.57 kw, 20% more than the HBCUs' stations' mean power level of 33.8 kw. The White schools' mean HAAT was 671.4 feet, almost 2 1/2 times the HBCUs' stations' mean HAAT of 273 feet. Thus, the HBCUs were given a late start, after which they received second class broadcast facilities.

77/ Plessy v. Ferguson, 163 U.S. 537 (1896) ("Plessy"). Before Brown v. Board of Education, 347 U.S. 483 (1954), overruled Plessy, the Supreme Court had interpreted Plessy as requiring states that provided separate facilities either to equalize them, or if that wasn't possible, to integrate them. See, e.g., Sweatt v. Painter, 339 U.S. 629 (1950) (holding that in order to educate a law student, a state must permit him to sit in a classroom and engage in dialogue with other law students of different backgrounds).

any record of the FCC even inquiring whether a state or its system of colleges had attempted even to provide ostensibly "separate but equal" facilities for minorities at its state-run HBCUs.

Thus, the FCC either deliberately afforded state segregation laws precedence over the nondiscrimination requirement of Section 151 of the Communications Act -- a bizarre inversion of McCulloch v. Maryland,[78] -- or it was acting on its astonishing misreading of state segregation laws as harmonious with the Communications Act.

The Commission's complicity with state-sponsored discrimination in public broadcasting continues to this day. The Commission routinely renews the licenses of every public broadcaster in the country without even asking whether their educational resources have been apportioned without discrimination by their parent licensees, including state agencies and college systems.[79]

By enabling educational broadcasters to practice discrimination in operating FCC-licensed facilities, the FCC has also helped to prevent minorities from securing commercial licenses. In a recent law review article, Antionette Cook Bush and Marc S. Martin explain:[80]

78/ 4 Wheat. 316, 421, 4 L.Ed 579 (1822).

79/ In the higher education context, "even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State's prior de jure segregation and that continues to foster segregation. The Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination.' Lane v. Wilson, 307 U.S. 268 (1939). If policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices" (emphasis in original). Ayers v. Fordice, 505 U.S. 717, 729 (1992) ("Ayers").

> the agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses exclusively to nonminority applicants until 1973. Moreover, this disparity was further entrenched by the licensing methodology - comparative hearings - which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s - years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants. Accordingly, the FCC's comparative hearing procedure contained an inherent bias in favor of nonminorities until reforms were finally adopted in 1978 (fns. omitted; emphasis supplied).

Applicants for new broadcast licenses found that broadcast experience was necessary in order to obtain bank financing. Under the Ultravision rule, this financing had to be sufficient to underwrite construction and a full year of broadcast operation with zero revenue.[81] The Fowler Commission repealed Ultravision, finding that it "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses."[82]

Even a self-financed applicant would find that broadcast experience and "past broadcast record" were valuable and often determinative comparative criteria in these hearings. Indeed, as late as 1993, past broadcast experience was enough to swing the grant from a minority to a nonminority in a comparative case.[83]

80/ A. Bush and M. Martin, in "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 Federal Comm. Law Journal 423, 439 (1996) ("Bush and Martin").

81/ Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision").

82/ Financial Qualifications Standards, 87 FCC2d 200, 201 (1981).

83/ See, e.g., Great Lakes Broadcasting, 8 FCC Rcd 4007, 4010 (1993) (Dissenting Statement of Commissioner Andrew Barrett).

As we have seen, minorities in many states were entirely unable to obtain broadcast experience or past broadcast record because they were barred from attending universities operating the only FCC-licensed educational TV and radio stations.

The FCC's ratification of discrimination also extended to commercial stations. The FCC's commercial licensing misconduct severely disadvantaged the MBTIs. By enabling commercial broadcasters to discriminate freely in employment and still keep their broadcast licenses, the FCC helped ensure that almost no broadcast jobs would be available to minorities. Thus, knowing that no jobs would be available for their graduates, private minority colleges and universities were inhibited for years from establishing broadcasting programs. Indeed, none was established until 1971, when Howard established its program in reliance on the promise of employment opportunities stemming from the just-adopted EEO Rule. Furthermore, those who might have tried to establish non-college training schools for minorities could not do so because there would have been no job potential for their graduates.

The FCC facilitated commercial station discrimination by granting, and then routinely renewing without investigation, the licenses of commercial stations which the FCC knew were engaging in deliberate employment discrimination.[84/] One might think that the

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84/ As an expert agency, the FCC is presumed to be familiar with the fundamental policies of its licensees. FCC commissioners regularly speak to state broadcast associations. Some commissioners must have noticed that no minorities attended these meetings. They must have noticed, when visiting licensees' facilities, that no minorities worked there. They certainly must have noticed that, until the 1960's, the FCC's own staff was all-White except at the secretarial and janitorial levels. That couldn't have happened unless the regulated industry and the broadcast training schools, from which the FCC then drew the bulk of its staff, were segregated, or unless the FCC itself discriminated in employment, or both.

Commission's character qualifications test would have required denying segregationists' broadcast applications. Incredibly, the reverse was true. In a published decision that is the smoking gun of this story, the FCC resolved a conflict between the Communications Act and a state segregation law by giving full faith and credit to the state segregation law. Remarkably, this decision was issued in 1955 -- a year after Brown I.

This startling decision arose in a VHF comparative licensing case, Southland Television Co.[85/] The Commission had to decide which of three applicants would be granted a free construction permit for millions of dollars worth of spectrum space with which to construct what would be the ABC affiliate in Shreveport.

One of the applicants, Southland Television, was headed by Don George, a movie theater operator. Louisiana law governing movie theaters assumed that theaters had two stories, like the 19th century opera houses on which they were modeled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race.[86/]

Mr. George, who did not want Blacks to patronize his theaters at all, was hampered by the literal language of the Louisiana movie theater segregation law, which contemplated two-story theaters. To circumvent the law, he built Louisiana's first one-story theaters, and also operated Louisiana's only Whites-only drive-in theaters.[87/]

85/ 10 RR 699, recon. denied, 20 FCC 159 (1955) ("Southland").

86/ The law was thought at the time to be "race-neutral" because the theater owners, rather than the state, decided which race was consigned to which story of the theaters. But every Black person over 40 remembers which story was the "Black" story.

87/ Other Louisiana drive-in theaters enforced segregation only within each automobile, to discourage miscegenation.

A competitor for the license, Shreveport Television, was the nation's first TV applicant known to include Black stockholders. Shreveport Television noted that Mr. George contemplated construction of a studio for live broadcasts. Shreveport Television asked the Commission to disqualify Mr. George's company because, based on Mr. George's history of movie theater operations, he could be expected to deny Blacks the opportunity to sit in the studio audiences of live productions[88/] at the television station.[89/]

The Commission was unmoved. It held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theaters, nor any evidence that "such admission would be legal under the laws of that state."[90/] In doing so, the Commission endorsed state segregation laws as harmonious with the Communications Act, going so far as to ratify a broadcast applicant's deliberate efforts to evade even the weakest state law permitting some integration.[91/]

88/ Since videotape was not invented until 1956, television broadcasts were done before live audiences, in studios set up to resemble miniature movie theaters. Southland Television proposed to have a balcony in its studio.

89/ Harry Plotkin, of Arent Fox Kintner Plotkin & Kahn, deserves our thanks for coming up with this way-ahead-of-its-time argument. Harry Plotkin passed away this year, and God bless him.

90/ Id., 10 RR at 750.

91/ Citing Southland, three years ago the FCC tentatively acknowledged for the first time that a good case could be made that "[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and...special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum." Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, 6306 (1996) (citing Statement of David Honig, Executive Director, Minority Media and Telecommunications Council, En Banc Advanced Television Hearing, MM Docket No. 87-268 (Dec. 12, 1995) (on file with counsel of record) at 2-3 and n. 2).

During the 1950s, the FCC continued to ignore even the most open and notorious discrimination. In 1956, almost every southern NBC affiliate refused to carry "The Nat King Cole Show" -- forcing NBC to cancel the critically acclaimed program (which is now seen in reruns on BET on Jazz.) Faced with this open and especially repugnant expression of race discrimination by dozens of its licensees, the FCC did nothing.

In the 1960s, the civil rights movement hardly left the FCC untouched. As the FCC was aware, it was not until 1962 that a television network (ABC) employed a Black reporter (Mal Goode, as its United Nations correspondent). But the FCC's response to the cry for freedom reflected timidity and hostility, in stark contrast to the forthright efforts of other agencies of the Kennedy and Johnson administrations.

The first test of the Commission's stance on civil rights came in Broward County Broadcasting, a 1963 case involving an AM station, WIXX, that the FCC had just licensed.[92/] The station was licensed to and situated in Oakland Park, a suburb adjacent to Ft. Lauderdale. The substantial Black population of Ft. Lauderdale received no Black oriented programming from any station. Consequently, WIXX decided to devote some of its program schedule to Black-oriented news, public affairs and music.[93/]

The City of Oakland Park complained to the Commission that WIXX was offering a format which the city did not need or want because "the Negro population to be catered to all reside beyond the

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92/ Broward County Broadcasting, 1 RR2d 294 (1963).

93/ Id. at 296.

corporate limits of Oakland Park."[94] The city government was fearful that Black professionals, once hired by WIXX to produce its programming, might choose to buy homes near their jobs.

The Commission had no business regulating program content.[95] Instead, it threw the station into a revocation hearing for changing its programming plans from the "general audience" schedule originally proposed in its licensing application -- a "character" violation. Faced with the probable loss of its license, the station dropped most of its Black programming, and the Commission quietly dropped the charges. That proved that the Commission's interest wasn't the licensee's "character" at all, which could hardly have been mitigated by "compliance" after a hearing was designated.

Two years later, in The Columbus Broadcasting Company, Inc.,[96] the Commission was faced with a radio licensee who had used

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94/ Id. at 294.

95/ Eighteen years later, the Supreme Court held that the Commission may not regulate program formats. FCC v. WNCN Listeners Guild, 450 U.S. at 582. But even in 1963, the Commission had only rarely sanctioned a licensee for offering one format over another. The only other reported cases arose in the late 1930's. The Commission denied three applications by the only applicants for their respective radio licenses because the applicants proposed to broadcast some of their schedules in "foreign languages" -- code for Yiddish, the language commonly used by Jewish refugees from Germany and Poland. In Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), the Commission held that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group...the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." See also Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936) and Voice of Brooklyn, 8 FCC 230, 248 (1940). Thus, under the Commission's pre-World War II jurisprudence, none but WASPs could hope for access to the public airwaves. It is a tribute to the current Commission that the NPRM expressly proposes a service whose purpose is rendering service to "limited groups."

96/ 40 FCC 641 (1965) ("Columbus").

his station "to incite to riot...or to prevent by unlawful means, the implementation of a court order" requiring the University of Mississippi to enroll James Meredith. After President Kennedy federalized the National Guard in anticipation of violence on Mr. Meredith's fourth attempt to enroll, the radio station called upon its listeners to go to Oxford and assemble to prevent Mr. Meredith's enrollment. Hundreds answered the call, and two people died in the ensuing riot.

However, the Commission merely "admonished" the station, ignoring the obvious fact that broadcast licenses are not awarded so they can be used to incite riots. The Commission's inaction is especially startling given the unlikely source of the complaint: the Federal Bureau of Investigation, then headed by J. Edgar Hoover.

The federal courts soon lost patience with the FCC's discriminatory policies. In the first Office of Communication of the United Church of Christ case,[97] the D.C. Circuit ordered the Commission to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council's viewpoint on civil rights. WLBT-TV went so far as to censor the pioneering "CBS Evening News with Douglas Edwards", displaying a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed.[98]

After an overwhelmingly one-sided hearing, the Commission renewed WLBT-TV's license again. On appeal again, the Court ordered the Commission to deny WLBT's license renewal. The Court had never

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97/ 359 F.2d at 994 (D.C. Cir. 1966) ("UCC I").

98/ Id. at 998.

before taken such an extraordinary action, but this time it held the administrative record to be "beyond repair."[99]

The Commission's new antidiscrimination policy -- imposed by the court in UCC II -- was applied haltingly and sporadically. In a 1971 Birmingham, Alabama UHF television comparative case,[100] the Commission had before it several applicants seeking construction permits. One applicant, Alabama Television, had a 16.2% stockholder, John Jemison, who owned a Birmingham cemetery. Jemison had participated in the cemetery's 1954 decision to continue its original 1906 policy of excluding Blacks.

The policy came to light when the cemetery turned away the body of a Black soldier killed in Vietnam. Yet the Commission found "extenuating circumstances" in Alabama Television's claim that the cemetery would have been sued by White cemetery plot owners.[101] Thus, the Commission ordered a hearing -- but framed the issues to focus only on why the applicant had covered the matter up, not whether a rabid segregationist had the moral character to be a federal licensee.[102] Even these cover-up allegations were thrown

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99/ Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969) ("UCC II"). See Bush and Martin, 48 Federal Comm. Law Journal at 439-440 n. 94 (noting that evidence in the record showed that the FCC was aware that the licensee had "engaged in a variety of discriminatory programming activities, including the refusal to permit the broadcasting of any viewpoints contrary to the station's own segregationist ideology"). The authors cite UCC II as an example of FCC conduct which might fall short of de jure discrimination, but which had the same effect.

100/ Chapman Radio and Television Co., 24 FCC2d 282 (1971) ("Chapman").

101/ Id. at 284. This was ridiculous. Twenty-two years earlier, the Supreme Court had ruled that such restrictive covenants were unenforcable. Hurd v. Hodge, 334 U.S. 24 (1948).

102/ Chapman, 24 FCC2d at 284.

out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges."[103]

Southland was one of the first television comparative hearings, and Chapman was among the last. Today, virtually all of the television spectrum in the United States has been given away. The FCC awarded minority owned companies exactly two out of about 1,200 free television licenses. In effect, the FCC presided over a 99.8% set-aside for Whites.

In 1969, the FCC adopted a rule barring discrimination by its licensees and requiring them, inter alia, to recruit minorities.[104] But in the 29 years during which the rule was in effect, the FCC barely enforced it. Only fourteen stations ever went to hearing on allegations of discrimination, and not one ever lost a license for race or gender discrimination.[105]

This history establishes four key points.

First, the FCC was an active co-conspirator with state governments in two kinds of schemes to prevent minorities from enjoying broadcast education: (a) awarding broadcast licenses to segregated institutions, and (b) the failure to enable even ostensibly "separate but equal" minority state institutions to secure broadcast licenses.

103/ Chapman Radio and Television Co., 21 RR2d 887, 895 (Kraushaar, Examiner, 1971).

104/ Nondiscrimination in the Employment Practices of Broadcast Licensees, 18 FCC2d 240 (1969) (adopting 47 C.F.R. §73.2080) ("Nondiscrimination - 1969").

105/ This history is given in detail in the Comments of Civil Rights Organizations in MM Docket Nos. 96-16 and 98-204 (Broadcast and Cable EEO), filed March 5, 1999, at 114-116 (copy available from undersigned counsel on request).

Second, even today, the FCC does not inquire into whether state noncommercial licensees discriminate in the allocation of broadcast facilities among their campuses.

Third, although it knew that the exclusion of minorities from broadcast education denied minorities an opportunity to obtain broadcast experience or a past broadcast record, the FCC built these criteria into its comparative licensing policies anyway. The FCC did not repeal a related, overbroad financing rule until 1981.

Fourth, the FCC routinely granted and renewed licenses of commercial broadcasters that discriminated, and in doing so openly embraced state segregation laws a year after Brown. It continued these policies into the early 1970s, thereafter adopting but rarely enforcing a rule to prevent employment discrimination. By denying minorities opportunities to work in commercial broadcasting, the FCC's actions inhibited private minority colleges from developing broadcast programs, and prevented the creation of non-college based minority broadcast training schools. These institutions could not come into being because there would have been no jobs available to potential graduates.

C. The FCC has the power and duty to remedy state sponsored and FCC-assisted race discrimination

Since the Commission's actions in broadcast regulation -- financed by the taxpayers -- have deeply affected constitutionally protected rights, remedial steps are justified.[106/] Indeed, remediation of government-assisted discrimination is a compelling

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106/ City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) ("Croson").

governmental interest.[107] That interest permits an agency to remedy the consequences of its own discrimination, and of its ratification, validation and facilitation of discrimination. Race-conscious remedial action may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior

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107/ Id., acknowleding that a government "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.") Justice O'Connor's majority opinion in Adarand recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) ("Adarand"). See also Wygant v. Jackson Board of Education. 476 U.S. 267, 286, rehearing denied, 478 U.S. 1014 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("Wygant") (observing that "[t]he Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.") Former Assistant Attorney General Patrick has declared that "[t]he need to remedy the effects of past discrimination by a state government undoubtedly constitutes a compelling interest." Testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 16.

discriminatory conduct that has ceased.[108]

Not only can the FCC remedy the effects of state-sponsored discrimination it facilitated, it must do so. The inclusion of remedial policies in spectrum management decisions such as LPFM development is essential to avoid a continuing violation of the equal protection and due process rights of minorities.[109]

This conclusion inexorably flows from an understanding both of the history of broadcasting and the history of civil rights. As W.E.B. DuBois accurately predicted, the defining issue of the 20th

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108/ Adarand, 515 U.S. at 269 (Souter, J., dissenting) ("[t]he Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.") A prior judicial, administrative, legislative determination of discrimination by the government is not required before the government may voluntarily choose to use affirmative action efforts. Croson, 488 U.S. at 500. However, an agency must have a "strong basis in evidence," for its determination that its practices have resulted in a significant exclusion or underutilization of minorities or have perpetuated exclusion perpetrated by others and that a race-based remedial effort is appropriate. Croson, 488 U.S. at 500, quoting Wygant, 476 U.S. at 277; see also Peightal, 26 F.3d at 1553; Concrete Works v. City and County Denver, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 514 U.S. 1004, 115 S.Ct. 1315 (1995); Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir.), cert. denied, 502 U.S. 1059 (1991), O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992); Stuart v. Roache, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); Cone Corp. v. Hillsborough County, 908 F.2d 908, 915 (11th Cir.), cert. denied, 498 U.S. 983 (1990). This does not mean that an agency must admit that it discriminated, either intentionally or inadvertently, before adopting remedial measures. See Johnson v. Transp. Agency, 480 U.S. at 652-53 (O'Connor, J, concurring); Wygant, 476 U.S. at 290 (O'Connor, J. concurring).

109/ Federal equal protection violations are redressed through the Due Process Clause of the Fifth Amendment, whose scope is contiguous with the Equal Protection Clause of the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954) ("Bolling") (ordering desegregation of the D.C. public schools when D.C. was federally governed). Equal protection analysis is the same under the Fifth Amendment as under the Fourteenth Amendment. Weinberger v. Wiesenfield, 420 U.S. 636, 638 n. 2 (1975).

Century was the "color line" -- the institutionalization of two societies, one White and one Black. Among the great triumphs of the 20th Century was the success of the civil rights organizations in petitioning the courts and federal agencies to break down a succession of barriers to equal opportunity, from the poll tax in the electoral sphere to broadcast employment and ownership.

We venture to predict that the defining issue of the 21st Century will be the information line -- the institutionalization of two societies, one information-rich and one information-poor. To achieve the full democratization of information flow, the courts and federal agencies must next break down a succcession of barriers to diversity of voices -- from the absence of a well-funded e-rate to bring the Internet to all public schools and libraries, to the remediation of the effects of generations of segregation in broadcasting over which the FCC has presided.

Thus, the FCC must take affirmative steps to remedy the consequences of its own past discrimination-ratifying behavior. A failure to do so would offend the Due Process Clause of the Fifth Amendment, informed -- as DuBois was -- by the speech clause of the First Amendment. See n. 109 supra.

At the outset, we articulate precisely the nature of the right being curtailed by government action.110/ The right being curtailed is access to meaningful participation in the stream of mass communications, both as creators and consumers. This right entitles groups, whose members have been targeted for discrimination because of their membership in the group, to enjoy the same

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110/ Railway Express Agency v. New York, 356 U.S. 106, 110 (1947) (dicussing procedure for analyzing equal protection and due process claims).

opportunities as other groups enjoy to create, transmit and interact[111/] with mass-distributed information, cultural content,[112/] and opinion. We refer to this right by the shorthand term "the Media Participation Right."

111/ The interactive nature of mass communications was recognized in Waters Broadcasting Corp., 91 FCC2d 1260 (1982) ("Waters"), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984). In Waters, the Commission awarded a decisionally significant minority enhancement to the ownership integration proposal of a Black woman who proposed to serve a nearly all-White community. The Commission held that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation." Id. at 1265. Thus, Waters validated the fact that communication between minorities and nonminorities, rather than just communication within a minority group, is an essential aspect of the diversity-promoting goal of the comparative hearing process. See also Dr. Martin Luther King Movement v. Chicago, 419 F.Supp. 667 (N.D. Ill. 1976) (emphasizing that Blacks' need for access to a White audience requires a municipality to permit a civil rights march in a White neighborhood).

112/ It is essential that cultural content be included with the scope of equal protection and due process in the media. Although the Commission's diversity jurisprudence has focused largely on informational, public affairs and instructional content, (see, e.g., NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) and Deregulation of Radio, 84 FCC2d at 975) it is cultural broadcast content which most influences and mediates social norms. The inclusion of culture among the elements of media content affecting due process or equal protection rights may be analogized to the inclusion of cultural (as well as athletic) activities in the scope of educational opportunities covered by desegregation decrees. Brown I held that education is "a principal instrument in awakening the child to cultural values." Id., 347 U.S. at 493. Courts have not wavered in requiring the integration of school bands and orchestras, sporting events and extracurricular clubs. See, e.g., Davis v. Board of School Commissioners of Mobile County, 393 F.2d 690, 696 (5th Cir. 1968) (declaring that failure to schedule games between all-Black teams against all-White teams "is no longer tolerable; the integration of activities must be complete.") Similarly, the Commission should not waver in including culture within the scope of content triggering due process or equal protection rights in the media.

The Media Participation Right is expansively defined to accurately reflect the ways in which consumers employ media in their daily lives: as participants in the creation and transmission of content, as recipients of that content, and as respondents to that content.

The Media Participation Right is broader in scope than the limited right of access which formed the basis for the Fairness Doctrine. The Fairness Doctrine focused only on the role of consumers as respondents to content.[113/] The Media Participation Right also includes consumers' role as creators and transmitters of content.

However, the Media Participation Right is easier to enforce than a right of access. The Fairness Doctrine was meant to be applied microscopically, on a station-by-station or issue-by-issue basis.[114/] The Media Participation Right applies macroscopically, implicating structural questions, such as who owns the media. The Media Participation Right is based upon the nexus between ownership

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113/ See Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir.), cert. denied, 493 U.S. 1019 (1989).

114/ Id. The Fairness Doctrine was repealed because the FCC accepted many broadcasters' contention that a potential compulsion to air particular viewpoints chills a broadcaster's exercise of her First Amendment speech rights. See Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC2d 143, 161 (1985) (finding that "in net effect" the Fairness Doctrine "often discourages the presentation of controversial issue programming"); Complaint of Syracuse Peace Council, 2 FCC Rcd 5043, 5057-58 (1987) (holding that the "Fairness Doctrine contravenes the First Amendment" and is therefore unenforceable against station); Fairness Report, 2 FCC Rcd 5272, 5295 (1987) (reaffirming decision to repeal Fairness Doctrine, finding that it "contravenes fundamental principles of free speech.")

structure policies and the diversity of viewpoints[115] -- a nexus which takes the form of a general inference that marketwide ownership integration will enhance marketwide viewpoint diversity, rather than a specific finding that minority ownership by any one broadcast station would inevitably enhance diversity of viewpoints at that station.[116] Thus, the Media Participation Right would never be applied to demand that a particular broadcaster transmit or abstain from transmitting any particular item of content, or that anyone enjoys a personal right to be a broadcast licensee.[117]

The differences between a limited right of access and the Media Participation Right are found in the constitutional provisions they are meant to effectuate. If there is a right of access, it flows directly from the First Amendment.[118] On the other hand, the Media Participation Right flows from the Due Process Clause of the

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115/ NAACP v. FPC, 425 U.S. at 670 n. 7 (finding a nexus between EEO and diversity of viewpoints); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990) ("Metro Broadcasting") (finding a nexus between minority ownership and diversity of viewpoints). Although Adarand overruled the aspect of Metro Broadcasting which would apply intermediate scrutiny to race-based policies, Adarand left untouched Metro Broadcasting's finding of a nexus between minority ownership and viewpoint diversity.

116/ Metro Broadcasting, 497 U.S. at 566; see NAACP v. FPC, supra, 425 U.S. at 670 n. 7.

117/ See Metro Broadcasting, 497 U.S. at 566.

118/ Red Lion, 395 U.S. at 390.

Fifth Amendment, although it is informed by First Amendment values.119/

The Media Participation Right is closely analogous to the interests which led the Supreme Court to declare that the government has an affirmative, nondiscretionary duty to bring about the integration of the nation's public schools. Brown I, 347 U.S. at 493.120/ Like the need to eliminate school segregation, the need to eliminate all vestiges of a previously segregated system of broadcasting is a compelling interest requiring remedial action.

Our media play at least as critical a role in the socialization and development of our children as do the

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119/ The Courts have not recognized a right of access to broadcasting under the First Amendment. Smothers v. CBS, 351 F.Supp. 622 (C.D. Ca. 1972); see Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). This lack of recognition of a right of access does not implicate the Media Participation Right, which flows not from the First Amendment but from the Due Process Clause of the Fifth Amendment, as enhanced by the First Amendment's goal of a robust exchange of ideas. Moreover, the Courts have long recognized that broadcast regulation should advance this First Amendment goal. NBC v. United States, supra. That principle exists independently of whether there is an individual right of access under the First Amendment alone.

120/ It can be argued that our voting rights jurisprudence provides an even closer analogy to the Media Participation Right than does school desegregation. However, we will never know, because history didn't cooperate. School desegregation came about through a direct confrontation in the courts over the Equal Protection Clause of the Fourteenth Amendment (Brown I) and the Due Process Clause of the Fifth Amendment (Bolling). The critical issues in that confrontation were litigated by the federal courts in a cornucopia of equal protection decisions between 1954 and 1964, when Title VI of the Civil Rights Act gave the Department of Health, Education and Welfare the power to withhold financial assistance from segregated school districts. Thereafter, the federal courts' role became focused largely on statutory interpretation. On the other hand, virtually all of our voting rights jurisprudence flows directly from the Voting Rights Act of 1965. Promptly after its enactment, that statute held to be, inter alia, appropriate legislation to enforce the Equal Protection Clause. Katzenbach v. Morgan, 384 U.S. 641 (1966). Thereafter, most voting rights litigation has focused on nonconstitutional, statutory issues.

schools.[121] The media, like education, is essential to the attainment or enjoyment of every element of civilized life in a modern democracy, including housing, health care, defense of one's civil liberties, and informed participation in the political process.[122] What school desegregation jurisprudence tells us about the importance of public education can also be said about free broadcast media today: (1) it has traditionally been recognized as vital to the "preservation of a democratic system of government,"[123] and (2) it is necesssary to prepare individuals to be self-reliant and self-sufficient participants in society.[124]

Moreover, the free broadcast media in particular, like public education, serves an essential public function[125] dependent on

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121/ See Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 10-18 (1989) ("Children's Television Act Senate Report").

122/ Blue Book (Federal Communications Commission, 1944) at 4.

123/ Brown I, 347 U.S. at 493; see Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

124/ Brown I, 347 U.S. at 493.

125/ Nobody seriously contends that the nation as we know it could survive long without free, over-the-air broadcasting. Over-the-air broadcasting, including both television and radio network, local and syndicated programming, has by far the greatest impact upon our society's educational, cultural and political development when compared to all other media outlets, because most people rely upon such programming as their primary source for information and entertainment. In fact, our system of product and service marketing, and our culture, are entirely dependent upon it. More important, our political system depends on it: Section 315 of the Communications Act presumes the existence of free broadcasting as a critical component of the democratic system. Red Lion, 395 U.S. at 389. Thus, when the federal government was shut down in January, 1996, leaving only "essential" (e.g. National Security) employees on the job, the Mass Media Bureau was expected to maintain a skeleton staff to ensure that the nation's broadcasting infrastructure would continue to operate.

government for its existence.[126] The existence of private schools does not relieve the government of its duty to cause the integration of free public schools,[127] Similarly, the presence of media available for a fee does not relieve the government of its duty to cause the integration of free media.[128]

126/ In adopting the EEO Rule, the Commission noted that "it has been argued that because of the relationship between the government and broadcasting stations, 'the Commission has a constitutional duty to assure equal employment opportunity.'" Nondiscrimination - 1969, 18 FCC2d at 241. The Commission identified Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ("Burton") as a citation which had been given in support of that proposition. Id. at n. 2.

The party which had made this argument in 1969 was the Department of Justice. Citing Burton, the Department argued that "the use of the public domain would appear to confer upon broadcast licensees enough of a 'public' character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discrimination on the grounds of race, color, or national origin." Letter to Hon. Rosel Hyde from Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, May 21, 1968, found in Petition for Rulemaking to Request Licensees to Show Non-discrimination in Their Employment Practices, 13 FCC2d 766, 776 (1968). The Department was absolutely correct. Indeed, the case for federal enforcement of due process or equal protection rights in broadcasting is even stronger than the case for enforcement of those rights in Burton. Burton involved a luncheonette which (owing to its location in a municipal building) could not have existed absent state action, but which was not essential to the performance of the state's functions. Free broadcasting cannot exist absent state action, and it is essential to the performance of the state's functions (see n. 125 supra).

127/ Griffin v. Prince Edward County Board of Education, 377 U.S. 218 (1964) (rejecting school board's plan to close the public schools to avoid compliance with school desegregation decree). See also Poindexter v. Louisiana Financial Commission, 274 F.Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968) (rejecting state's plan to finance private schools to avoid school desegregation decree).

128/ See FCC v. NCCB, 436 U.S. 795 (1978) (commenting that the existence of cable, newspapers, and the like does not remove the need for the FCC to supervise the ownership structure of the broadcasting industry).

The Brown I court imposed affirmative remedial duties on government because it found education to be nearly a fundamental right.[129] The Commission today must accept affirmative remedial duties because access to the stream of communications is nearly a fundamental right.[130]

129/ Brown I did not hold that education is a "fundamental" right, but it came close. Id. at 493 (education is "the very foundation of good citizenship"). The near-fundamental nature of education is manifest from the existence of compulsory education laws in every state. Id.

130/ Access to the stream of mass communications has not yet been held to be a "fundamental" right. Cox v. Louisiana, 379 U.S. 536 (1965), although, like education, it is close to fundamental. Red Lion, 395 U.S. at 389. The near-fundamental nature of access to the stream of mass communications is evident from, e.g., Section 307(b) of the Communications Act, which requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same", and Section 331(a), which requires the Commission to allocate commercial VHF channels "in a manner which ensures that no less than one such channel shall be allocated to each State, if technically feasible."

It is inevitable that as we continue to evolve from an industrial to an information society, Congress or the Courts will declare that both education and access to the stream of mass communications are fundamental rights. We have already seen some of this legal evolution in Turner I. In Turner I, the Court applied intermediate scrutiny when it found that the cable must-carry rules were not content-based. Those rules, e.g., specifically favor "noncommercial educational broadcasting." Id., 512 U.S. at 631-32 (quoting Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§534-535 (Supp. IV 1992); the language is in 47 U.S.C. §535(a)). The 1992 Cable Act states that one purpose for requiring cable carriage of local broadcasts is that "public television provides educational and informational programming" and local broadcast "provides public service programming that is responsive to the needs and interests of the local community." 47 U.S.C. §§521(a)(8)(A), (B) (1992).

However, even under the current state of the law, the Commission, as the expert agency and as the guardian of the limited and valuable broadcast spectrum resource, must recognize that access to the stream of communications is so close to fundamental that denial of such access violates the Due Process Clause of the Fifth Amendment.

Close parallels may be found between media participation and school desegregation: (1) the goals; (2) the scope of its implementation, and (3) the enforcement duty of government.

1. Goals. The primary goal of school desegregation is to promote equal protection and due process. Brown I, 347 U.S. at 492; Bolling, 347 U.S. at 501. Enhancing this goal is the pursuit of intellectual discourse, a close analog to the free flow of ideas promoted by the First Amendment, which fosters a student's intellectual, cultural and civic or political development.131/ The Media Participation Right flows from essentially the same set of rights. A child's intellectual, cultural and civic or political development, as well as her overall socialization, derives at least as much from the enjoyment of media as it does from the enjoyment of education.132/

2. Scope of Enforcement. A school desegregation decree is macroscopically directed at school systems rather than at individual children.133/ Such a decree will seldom guarantee a child a place in any particular school.134/ However, a school desegregation decree does guarantee that the school system will be configured, to the extent possible, to remove the effects of de facto racial barriers in the allocation of pupils to schools, the expertise of the teachers they encounter, the quality of the school buildings

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131/ Sweatt, 339 U.S. at 629.

132/ See Children's Television Act Senate Report.

133/ See Green v. County School Board of New Kent County, 391 U.S. 430 (1968) ("Green").

134/ Id. at 442.

they attend, the equipment they use, and the budget allocations per pupil.135/

A rule implementing the Media Participation Right would not guarantee any individual broadcast professional a job or a particular person a radio license; nor would it guarantee any particular broadcast listener or viewer a choice of particular licensees of stations.136/ Instead, such a rule would mediate the ownership structure policies of the industry so as to enhance the likelihood that members of communities with common and identifiable interests, such as minorities, will enjoy, to the greatest extent possible, the same opportunities to create, transmit and respond to content as is enjoyed by others.

3. Duty to Enforce. School desegregation is compulsory rather than discretionary.137/ A government may not decline to desegregate its schools if it had any material involvement in promoting segregation.138/ However, if state action profoundly exacerbated school segregation, the government has an absolute duty

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135/ Id. at 437-38.

136/ See Waters, 91 FCC2d at 1265.

137/ See Ayers, 505 U.S. at 729 (holding that a state has an affirmative obligation to eliminate all vestiges of a previously segregated educational system; that obligation is not satisfied by mere adoption of race-neutral policies). The principle that remedial steps are compulsory, rather than discretionary, is well established in equal protection jurisprudence. See Louisiana v. U.S., 380 U.S. 145, 154 (1965) (declaring that a federal district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

138/ Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973) ("Keyes"). Justice Brennan's majority opinion in Keyes declared that proof of intentionally segregative school board actions as to each individual school was unnecessary because the effects of segregation on one school would inevitably spill over onto other schools.

to eliminate the present effects of its own actions.[139] Obviously, the remedial decree may not itself exacerbate de facto segregation.[140]

Moreover, the government must enforce school desegregation decrees aggressively. Token[141] or belated[142] enforcement is impermissible. Similarly, the FCC may not decline to enforce due process or equal protection rights in the media. To the greatest extent possible, the FCC must eliminate irrational and artificial barriers to the full integration of the media since it has had material involvement in erecting and sustaining those barriers.[143]

139/ Gilmore v. City of Montgomery, Alabama, 417 U.S. 456 (1974) (a dual school system perpetuated by state action is unlawful). See also U.S. v. Yonkers Board of Education, 624 F.Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988) (finding that municipality's construction of de facto segregated public housing with race-based siting rendered the municipality's supposedly race-neutral "neighborhood schools" policy inherently discriminatory).

140/ Swann v. Charlotte-Mecklenburg Board of Education, 334 F.Supp. 623 (1971) (finding that a supposedly remedial plan would have caused a return to de facto segregation).

141/ Ayers, 505 U.S. at 729 (holding that a state must eliminate all vestiges of previous segregation is not satisfied by mere adoption of race-neutral policies); Sweatt, 339 U.S. at 629 (allowing a law student to sit in a classroom without an opportunity to engage in dialogue with other students does not provide meaningful access to education).

142/ Brown v. Board of Education, 349 U.S. 294, 299 (1955) ("Brown II") (requiring desegregation "with all deliberate speed" so that children currently enrolled in school may benefit); Griffin, 377 U.S. at 234 (declaring that the time for mere "deliberate speed" has run out).

143/ Just as discrimination affecting one school invariably spills over and affects desegregation efforts at other schools (see Keyes, discussed at n. 138) discrimination at one broadcast station invariably spills over and affects minority and female opportunity at other stations. For example, discrimination by a state educational licensee inhibits commercial stations from hiring minorities because none have been trained, and commercial stations' discrimination inhibits the establishment of MBTIs because there would be no jobs for the graduates. See p. 41 supra.

Thus, given that the FCC's actions dramatically assisted discriminators in artificially maintaining barriers to integration, the Commission has an absolute duty to eliminate the present effects of its own actions.

By exercising its licensing and license renewal powers to give broadcasters free access to billions of dollars worth of public spectrum without a clue whether they discriminated, the Commission violated the Fifth Amendment Due Process rights of minorities. The Commission has recognized -- sporadically but clearly -- that it has authority to take these remedial steps in the exercise of its spectrum management and licensing authority.144/ Consequently, in this proceeding, the Commission should issue a decree which accepts the duty of aggressively bringing about the racial integration of broadcast ownership and employment.145/

144/ See, e.g., Garrett Broadcasting Service v. FCC, 513 F.2d 1056 (D.C. Cir. 1975); Atlass Communications, Inc., 61 FCC22d 995 (1976).

145/ As noted earlier, remedying past discrimination in licensing is not the only reason the Commission should assist MBTIs. Special efforts will be needed to assure continued equal employment opportunities, now that the Commission is without power to adopt even the extremely modest and seldom-enforced EEO rule it operated between 1969 and 1998. MBTIs, which already train nearly half of minority broadcast graduates, are therefore a particularly essential element in any national strategy to promote minority broadcast employment.